IN THE HIGH COURT OF ANDHRA PRADESH :: AMARAVATHI

HON'BLE SMT. JUSTICE VENKATA JYOTHIRMAI PRATAPA

C.M.A.No.1103 of 2004

Between:

Savaram Sarojanamma (died) and four others.

...Appellants

and

Mada Madhusudhana Rao and another

...Respondents

JUDGMENT:

The unsuccessful decree holder preferred the present appeal impugning the Order dated 13.07.2001 in EA.No.426 of 1999 in EP.No.38 of 1998 in OS.No.55 of 1990 on the file of the Senior Civil Judge's Court, Rajampet filed by the third party under Order-21 Rule 97 of the Code of Civil Procedure, 1908, wherein the execution petition was dismissed by allowing the claim of the third party.

2. Heard Sri.Venkateswara Rao Gudapati, learned counsel for the appellant. None represented on behalf of the respondents.

3. Respondent No.1 herein Mada Madhusudhana Rao being third party filed an application under Order 21 Rule 97

CPC in the Execution Petition claiming title over the property with a prayer to dismiss the Execution Petition.

4. Respondent No.2 herein filed OS.No.55 of 1990 which is a suit for partition relating to the schedule property showing the appellant herein as defendant. The suit was decreed allotting the half share to the appellant and remaining half share of the schedule property to the respondent No.2 herein.

5. Originally the schedule property belongs to one Katikam Gangaiah. His wife predeceased him and they had no issues. The respondent No.1 Mada Madhusudhana Rao is the grandson of Katikam Gangaiah. The mother of Mada Madhusudhana Rao is the daughter of elder brother of Katikam Gangaiah. Katikam Gangaiah has two brothers *viz.*, Katikam Krishnaiah and Katikam Venkata Chalapathi and one sister who is no other than the appellant herein i.e., Savaram Sarojanamma.

6. After the death of Katikam Gangaiah his brother Venkata Chalapathi filed the suit showing Sarajonamma as defendant. The suit in OS.No.55 of 1990 was decreed allotting the equal share to both of them. Thereafter, the

defendant Sarojanamma filed EP.No.38 of 1998 seeking delivery of the property after passing of the final decree. When the Court Amin visited the schedule property for delivery of property, Mr.Mada Madhusudhana Rao objected and filed EA.No.426 of 1999 stating that the said Katikam Gangaiah executed a will in a sound and disposing state of mind on 05.02.1990 bequeathing the schedule property in his favour. Thereafter, Katikam Gangaiah died on 07.06.1990. The petitioner acquired the property by virtue of the will and he has been in possession and enjoyment of the property. The respondents i.e., Sarojanamma and Venkata Chalapathi filed the suit by creating some records and attempted to take possession over the property.

7. The case of the appellant Sarojanamma is that the said will projected by Mr.Mada Madhusudhana Rao is a concocted one. He is aware of the suit proceedings and he never referred the will before the Amin. The Court Amin in collusion with Mr.Mada Madhusudhana Rao refused to deliver the property. Mr.Mada Madhusudhana Rao has no title or possession over the property. The 2nd respondent K.Venkata Chalapathi did

not choose to appear and file any counter and he was set exparte.

8. As can be seen from the impugned order the petitioner filed a memo to the effect that the 2nd respondent died and EA is abated against him.

9. During the course of enquiry PWs.1 to 3 were examined and Exs.A1 to A60 were marked. On behalf of respondents RWs.1 to 3 were examined and Exs.B1 and B2 were marked.

10. Having heard the submission of both learned counsel and on appreciation of the evidence on record, learned Judge allowed the petition and dismissed the Execution Petition.

11. The first respondent i.e., Ms.Sarojanammapreferred the present appeal on the grounds that the learned Judge exceeded the jurisdiction by holding that the decree is a nullity by deciding the right of the third party. The petition under Order 21 Rule 97 CPC is not maintainable before the court to decide the title over the property claimed by the third party. The petitioner has to file a separate suit seeking such declaration that the decree in OS.No.55 of 1990 is not binding on him. The will which is relied on by the petitioner is

a forged one. The learned Judge ought to have sent the same to the Expert for examination. The will is never acted upon. Dismissing the Execution Petition basing on such a will is unsustainable. The petitioner is not in possession of the property.

12. Having heard the submissions of learned counsel for the appellant and on perusal of the material on record, now the points would emerge for determination in this appeal are ;

1. Whether the Executing Court can decide the claim of title raised by the third party under Order 21 Rule 97 CPC ?
2. Whether the petitioner/3rd party proved the execution of the will relating to the schedule property ?
3. Whether the order impugned is on correct lines or any interference is required ?

POINTS :

13. The question raised by the learned counsel for the appellant relating to the authority of the Court to decide the claim of title laid by the third party in the pending execution proceedings is no more *res-integra* in the light of the legal provisions referred infra.

> Order XXI Rule 97 deals with the resistance or obstruction to possession of immovable property by 'any person' obtaining possession of the property

against the decree holder. It empowers the 'decree holder' to make an application complaining about such resistance or obstruction.

14. In **Jini Dhanrajgir Vs. Shibu Mathew**[1], Hon'ble Apex Court decided on 16.06.2023 answered the very same point raised in the present appeal. The relevant paragraphs 17, 18 and 22 are extracted hereunder :-

> 17. Section 47 of the CPC, being one of the most important provisions relating to execution of decrees, mandates that the court executing the decree shall determine all questions arising between the parties to the suit or their representatives in relation to the execution, discharge, or satisfaction of the decree and that such questions may not be adjudicated in a separate suit. What is intended by conferring exclusive jurisdiction on the executing court is to prevent needless and unnecessary litigation and to achieve speedy disposal of the questions arising for discussion in relation to the execution, discharge or satisfaction of the decree. Should there be any resistance offered or obstruction raised impeding due execution of a decree made by a court of competent jurisdiction, the provisions of Rules 97, 101 and 98 of Order XXI enable the executing court to adjudicate the inter se claims of the decree-holder and the third parties in the execution proceedings themselves to avoid prolongation of litigation by driving the parties to institute independent suits. No wonder, the provisions contained in Rules 97 to 106 of Order XXI of the CPC under the sub-heading "Resistance to delivery of possession to decree-holder or purchaser" have been held by this Court to be a complete code in itself in Brahmdeo Chaudhary (supra) as well as in a decision of recent origin in Asgar vs. Mohan Verma13. In the latter decision, it has been noted that Rules 97 to 103 of Order XXI provide the sole remedy both to parties to a suit as well as to a stranger to the decree put to execution.
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> 18. In Bhanwar Lal vs. Satyanarain14, this Court held that when any person, whether claiming derivative title

[1] (2023) SCC Online 643

> from the judgment-debtor or sets up his own right, title or interest de hors the judgment debtor, the executing court whilst executing the decree, in addition to the power under Rule 35(3), is empowered to conduct an enquiry whether the obstruction by that person is legal or not. 13 (2020) 16 SCC 230 14 (1995) 1 SCC 6
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> 22. Considering the scheme of Order XXI Rules 97 to 106, this Court in Silverline Forum Pvt. Ltd. v. Rajiv Trust & Anr. 17 found it difficult to agree with the High Court that resistance or obstruction made by a third party to the decree put to execution cannot be gone into under Order XXI Rule 97. Referring to Rules 97 to 106, this 15 (1995) 1 SCC 242 16 (1996) 3 SCC 154 17 (1998) 3 SCC 723 Court further held that they were intended to deal with every sort of resistance or obstruction raised by any person and that Rule 97(2) made it incumbent on the court to adjudicate upon such complaint in accordance with the procedure laid down. This Court also proceeded to observe: "It is clear that executing court can decide whether the resistor or obstructer is a person bound by the decree and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21, Rule 97(2) of the Code. The adjudication. mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or even on the averments made by the resistor. Of course, the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary".

15. In the light of the judgment referred supra it is luculent that the executing court has to decide any claim of title raised by the third party by making obstruction to deliver the property during the pendency of the execution petition. The object behind allowing the third party to raise such questions before the executing court is to avoid multiplicity of

proceedings and also to see that the Decree Holder shall enjoy the fruits of the decree without any delay.

16. In the present case the third party/petitioner being brother's daughter's son to the testator claiming before the court that he is the absolute owner of the property by virtue of the will executed by Katikam Gangaiah in sound and disposing state of mind. As rightly argued by the learned counsel for the appellant when the petitioner projected his case through a will the entire burden is on him to prove that the will is a valid one executed by testator in a sound and disposing state of mind and it is not surrounded by any suspicious circumstances.

17. Learned counsel for the appellant brought to the notice of this court that PW.1 testified before the Court that at the time of execution of the will Ex.A1 door number of the schedule property is shown as 4/152. He does not know the old door number. Needless to say that the documents filed by PW.1 like Exs.A2 to A60 which are electricity receipt bills, demand notices, water tax receipts contained the door number i.e., 4/152. However Ex.A1 will shows the door

number of the property is 4/224. No plausible explanation was given by PW.1 in this regard. There is some force in the argument that the documents filed by the petitioner to prove the possession over the property are not tallied with the door number mentioned in Ex.A1. Be that as it may the claim of the petitioner is by virtue of the will. Petitioner has to prove that the will said to have been executed by Katikam Gangaiah bequeathing the property to him is in accordance with law. Needless to say that the will must be attested by atleast two attestors. It must contain the recital that the cancellation power is vested with the testator. As can be seen from Ex.A1, the recitals would show that, it is open to the testator to cancel the will during his lifetime.

18. It is essential to chalk out the legal provisions concerning execution of wills before going into the issue involved. Section 63 of the Indian Succession Act, 1925 stipulates that the testator shall execute the will by signing or affixing his mark to the will or it be signed by some other person, in his presence and on his direction. It further lays down that a will, is ought to be attested by two or more witnesses, each of whom, has seen the testator or such other

person, sign the will. Moreover, attestation must be in consonance as defined in Section 3 of the Transfer of Property Act. However, the law does not mandate a will to be registered and merely because a will is unregistered, inferences cannot be taken against its genuineness, as held by the Apex Court in ***Ishwardeo Narain Singh v. Kamta Devi***.[2]

19. Thus, a Deed of will is thus one such document which requires attestation. At this juncture, Section 68 of the Indian Evidence Act, 1872 which relates to the proof of execution of document required by law to be attested, comes into play. Vide Section 68, if a document is required to be attested by law, it shall not be used as evidence until at least one attesting witness is examined in the proof of such execution. Therefore, execution and attestation are two different aspects. The relation between these two acts can be simply put as, there cannot be a valid execution, without attestation when it is so required by law and when attestation is necessary, proof of due attestation is a must.

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[2] (1953) 1 SCC 295

20. In the present case PWs.2 and 3 are the attestors of the will, they have categorically deposed about the execution of the will by the testator Katikam Gangaiah. Their evidence is well corroborated by the evidence of PW.1 in all material particulars. Nothing has been elicited by cross examining them.

21. On the other hand respondent No.1 was examined as RW.1. RW.1 in cross examination, stated that a day before the delivery, in the presence of petitioners the Court Amin visited the schedule property. During that time he observed the presence of some other person. The petitioner was there in the schedule property in the very same evening. Keeping aside the documents filed to prove the possession over the property i.e., Exs.A2 to A60, the evidence of RW.1 would probabalize the case of the petitioner. The evidence of RWs.2 and 3 does not require much discussion, since they are the witnesses to the fact of execution of Ex.B2 by Katikam Gangaiah. Ex.B2 is the registered sale deed executed by Katikam Gangaiah during his lifetime. This document has been filed by the respondents to enable the court to compare the signature of Katikam Gangaiah on Ex.B2 and Ex.A1. It is

apt to say that Venkata Chalapathi (brother of Katikam Gangaiah) originally filed the suit. But, he did not choose to contest the present petition. During the pendency of the petition he died. The petition against him is abated since the legal representatives of late Venkata Chalapathi were not brought on record. In the light of the aforementioned discussion the impugned order is reasoned one and does not brook interference of this Court in Appeal. Accordingly, the appeal is liable to be dismissed.

22. In the result, the appeal is dismissed without costs.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

VENKATA JYOTHIRMAI PRATAPA, J

Date: 01.08.2023
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HON'BLE SMT. JUSTICE VENKATA JYOTHIRMAI PRATAPA

C.M.A.No.1103 of 2004
Dated 01.08.2023

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